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SUPREME COURT OF THE UNITED STATES

October Term, 1929.

No. 32

ANNA URAVIC, as Administratrix of the goods, chattels and credits which were of ANTON URAVIC, deceased,

Petitioner,

against

F. JARKA COMPANY, INC., and UNITED AMERICAN LINE, INC.,

Respondents.

Brief in Behalf of Respondent in Opposition to Petition for Certiorari.

ERNIE ADAMSON,
For Respondent.

THE REPORTER CO., WALTON, N. Y.
New York Office: 258 Broadway, Room 612. Phone 3642 Barclay.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929—No. 581.

ANNA URAVIC, as Administratrix of the Goods, Chattels and Credits, which were of Anton Uravic, Deceased,

Petitioner,

against

F. JARKA COMPANY, Inc., and UNITED AMERICAN LINE, Inc.,

Respondents.

I.

Jurisdiction.

Petitioner is proceeding under the provisions of the United States Code, Section 344 (b) Title 28. Unless the record shows that the state courts denied petitioner a right or benefit claimed by virtue of an Act of Congress the petition should be denied.

II.

Resume of Facts.

The state courts rendered no opinions. We have only the orders of dismissal and affirmance. The record discloses that the facts briefly stated are as follows:

Anton Uravic, a longshoreman, employed by respondent, was on the 13th day of July, 1926, working upon a German steamship in the Port of New York. As a regular part of his work, Uravic was assisting in the movement of certain drafts of cargo from the hold of the German steamship to the dock. While engaged in this work, Uravic's fellow workers allowed one of these heavy drafts to strike him, resulting in death (31-66). The question of whether this was done negligently or deliberately is not material or relevant in this proceeding and no discussion will be had on this point.

Anna Uravic, as administratrix, commenced an action at common law in the Supreme Court of the State of New York, Second Judicial Department, by summons and complaint served on November 1, 1926, for damages in the sum of $50,000.00 (6). The action was originally instituted against F. Jarka & Co., Inc., and United American Line, Inc., but at the trial, petitioner discontinued as against the latter. No right or benefit by virtue of an Act of Congress was claimed by petitioner until day of the trial, March 30, 1927, at which time plaintiff's counsel informed the Court orally that the action was "under the Jones Act exclusively" (24).

Petitioner proceeded with the presentation of testimony before the Court and a jury. At the conclusion of petitioner's case, the Court, after having heard all the testimony, dismissed the complaint upon its merits and after due notice to opposing counsel and in compliance with the rules of practice of the Trial Court, an order was entered reading in part as follows (19):

> "* * * the close of plaintiff's case, the defendant F. Jarka & Co., Inc., having moved to dismiss the complaint herein upon the ground that the plaintiff has failed to make out a cause of action against said defendant, * * *"
>
> "Ordered that the said motion be and the same is hereby granted, and the complaint of the plaintiff is hereby dismissed upon the merits."

Thereafter, on appeal to the Appellate Division of the Supreme Court, the judgment was affirmed. An appeal was then taken to the Court of Appeals, which resulted in another affirmance. The Court of Appeals wrote no opinion, but by memorandum merely said:

> "On the authority of *Resigno v. Jarka,* 248 N. Y. 225."

Petition for writ of certiorari was served upon respondents' counsel January 21, 1930.

Questions Presented.

The only question presented to the Court by this petition is: Did the State Courts deny to this petitioner any right or benefit claimed by virtue of an Act of Congress?

The question of the applicability of Section 33 of the Jones Act to this particular case is a collateral question which should not be considered until the former question is carefully considered and determined. If the record does not disclose upon its face that petitioner was deprived by the State Courts of some right or benefit claimed by virtue of an Act of Congress, the petition should be denied.

If the first question is determined affirmatively by the Court, then it should proceed to consider the second question. Unless the Court is convinced that Section 33 of the Jones Act is applicable to this particular case and that the final result in this case would be different, the petition should be denied.

In other words, this is an action at common law in the Supreme Court of the State of New York, and the Trial Court in the final analysis is the tribunal wherein the sufficiency or insufficiency of the evidence must be weighed and determined.

Petitioner's Reasons for Granting the Writ.

The petition sets forth four reasons for granting the writ. One of these is founded upon an alleged conflict of decisions which will be discussed elsewhere in this brief. Another reason is founded upon the decision by this Court in *Plamals v. S. S. Pinar Del Rio,* 277 U. S. 151.

The two remaining reasons may be briefly considered and eliminated. Since July 1st, 1927, longshoremen have been subject to the provisions of the *Longshoremen and Harbor Workers' Compensation Act.* No common-law actions for damages such as the one at bar have originated since that date. The case at bar is one of the very few which are still in litigation. As a matter of fact respondent has knowledge of only seven such cases now pending. These pending cases would have gone to trial before this time if the plaintiffs had been diligent.

In regard to the question of uniformity of maritime

law, the attention of the Court should be directed to the fact that the distinction between a longshoreman injured upon a dock and another longshoreman injured upon a ship is recognized even under the *Longshoremen and Harbor Workers' Act.* In one instance the accident would be subject to the jurisdiction of the State Commission, and in the second instance, the accident would be subject to the jurisdiction of the Federal Commission. Congress evidently considered all these facts before enacting the *Longshoremen and Harbor Workers'* bill into law. Petitioner seems to be laboring under the impression that through some action of this Court, the law affecting longshoremen might be standardized so as to apply in all places and under all circumstances.

At this point we wish to call the attention of the Court to the statement contained in the first paragraph on page 14 of petitioner's brief, which refers to "many claims of longshoremen injured prior to the passage of the Longshoremen and Harbor Workers' Compensation Act of 1927" and also refers particularly to the case of *William O'Reilly v. Cunard S. S. Co.* as being one of the more important cases now pending in the Southern District of New York. This petition verified by counsel on January 16, 1930, indicates careless consideration of the facts set forth. The records of the United States District Court of the Southern District of New York show that the *O'Reilly* case came on for trial before the Hon. William Bondy, D. J., and a jury on January 24, 1927. The Court charged the jury as follows:

> "Now, you gentlemen, having found the facts, will have to apply the law as the Court gives

> it to you; and the Court charges you that this defendant is not responsible for any negligence of the fellow servants of the plaintiff. If you find that the plaintiff was hurt through the negligence of the fellow servants of this plaintiff, then the defendant is not responsible for that negligence of the fellow servants causing the injury."

The jury brought in a verdict for the defendant and upon motion by plaintiff's counsel to set aside the verdict the Court rendered the following opinion:

> "The decision of this motion having been withheld with consent of counsel pending the decision of the New York Court of Appeals in *Resigno v. F. Jarka Co., Inc.*, and that decision having been rendered May 29, 1928 (248 N. Y. 225), the motion is denied. See also *Plamals v. S. S. Pinar Del Rio*, U. S. Supreme Court May 14, 1928, U. S. Circuit Court of Appeals, 16 Fed. 2nd 362; *Zarowich v. F. Jarka Co., Inc.*, 21 Fed. 2nd 187; *Mahoney v. International Env. Co.*, 1928 A. M. C. 154; *Schottes v. North Coast Navigation Co.*, 1928 A. M. C. 616."

Clearly petitioner's counsel is not aware that the United States District Court of the Southern District of New York has adopted the rule announced by the New York Court of Appeals in *Resigno v. F. Jarka Co., Inc., supra.*

Law and Argument.

Petitioner relies upon the following decisions in support of the alleged conflict of decisions.

> *Zarowitch v. F. Jarka Co., Inc.*, 21 Fed. Rep. 2nd 187, United States District Court for the Eastern District of New York.

Mahoney v. International Elevating Co., Inc., 23 Fed. Rep. 2nd 130, United States District Court for the Eastern District of New York.
Williams v. Oceanic Stevedoring Company, 27 Fed. Rep. 2nd 905, United States District Court for the Southern District of Texas.
Peterson v. Independent Stevedore Company, United States District Court, District of Oregon, March 18th, 1929; not yet reported in Fed. Rep. but found in 1929 American Maritime Cases 629.
Philip McGinn v. North Coast Stevedoring Company, 149 Wash. 1, Supreme Court of the State of Washington.
Gustav Ranstrom v. International Stevedoring Company.

The *Zarowich* decision, *supra*, was merely the determination of a motion for a new trial. The case is now upon the calendar awaiting trial.

The *Mahoney* case, *supra*, was settled amicably by the parties and counsel is informed that no appeal has been taken in that case.

The decision in *Williams v. Oceanic Stevedoring Company, supra*, was on a motion and counsel has been unable to ascertain whether an appeal has been taken.

The *Peterson* decision, *supra*, was merely the determination of a motion.

The decision of the Supreme Court of the State of Washington in *Gustav Ranstrom v. International Stevedoring Company, supra*, was a final determination, but, so far as the question at bar is concerned, it is predicated upon the decision in *Philip McGinn v. North Coast Stevedoring Company, supra.*

The decisions in the *Zarowich* and *Mahoney* cases, *supra,* appear to constitute the foundation for the decision in *Williams v. Oceanic Stevedoring Company, supra,* and *Peterson v. Independent Stevedore Company, supra,* as well as the two cases decided by the Supreme Court of the State of Washington. None of these District Court cases was a final determination and so far as the question at bar is concerned, the only final determination worthy of the consideration of this Court is the case of *Philip McGinn v. North Coast Stevedoring Company.* The circumstances disclosed by the decision in that case seem to indicate: That upon the trial, verdict was rendered for plaintiff, but upon appeal to the Supreme Court of the State of Washington, the judgment was reversed on account of the failure of the Court to properly charge the jury with regard to the assumption of risk by the plaintiff. It is true that the Court also held in disposing of a collateral question:

> "A stevedore is entitled to the benefits of Section 33 of the Merchant Marine Act."

The Court also said in substance:

> The Supreme Court of this state determines for itself the law within its jurisdiction and is not bound to follow the Federal Supreme Court.

This decision is the only one cited by petitioner which could be considered as final and the principal question raised by the petition at bar is passed upon collaterally in such a manner as to leave a doubt.

The *Ranstrom* case, *supra,* which is predicated directly upon the *McGinn* case, involved serious questions of fact, one of the Justices of the Supreme Court of Washington dissenting, as follows:

> "Tolman, J.: 'As I see the facts, the evidence was insufficient to take the case to the jury. I therefore dissent.'"

The majority opinion deals with many questions and among them will be found the following language:

> "The principal question raised is whether the Seamen's Act paragraph 33 applies. The authorities from other jurisdictions seem to be divided on this question, and at the time of appeal had not been decided in this state, but this Court is now committed to the doctrine that in cases such as we have here, the Act applies. (Refers to *McGinn* decision.)"

Petitioner seems to be under the impression that the Jones Act is complete in itself, and that it supercedes entirely the common law of the several states. This we submit is an erroneous view. The act by its terms specifically reserves to the plaintiff the right to proceed at common law unmodified, or to proceed at common law as modified by the Jones Act. In the case at bar, petitioner instituted an action at common law and made no claim whatever to any right or benefit under an Act of Congress. It was not until the day of the trial that the petitioner's counsel informed the Court orally:

> "This is an action under the Jones Act exclusively."

If it can be said that petitioner had a right to proceed in that manner, the common law of the State of New York must still govern the procedure and rights of the parties, except in so far as the Jones Act might effect a modification, if that Act of Congress does apply. Our assertion that the Jones Act

modifies instead of supercedes the common law is well supported by the language used by this Court in deciding the case of *Engel v. Davenport*, 271 U. S. 816:

> "It is settled by the decision in *Panama R. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 Sup. Ct. Rep. 391, that S. 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the martime law by changes that are countrywide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' (36) Liability Act and its amendments—adopted by the general reference to 'all statutes of the United States modifying or extending the common law rights or remedy in cases of personal injuries to railway employees,'—and 'extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules'; that is, that it grants them, as an alternative, the common-law remedy of an action 'to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules,' which, as a modification of the maritime law, may be enforced through appropriate proceedings in personam on the common-law side of the courts."

This Court also said in the same decision:

> "* * * And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence, but also, under

> the Employers' Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part." * * *

Thus, in the case at bar, we must bear in mind that the petitioner first instituted an action at common law unmodified by any Federal Statute, then on the day of the trial claimed orally a right or benefit by virtue of an Act of Congress. The petitioner as this Court has very well said, assumed the burden of establishing the necessary degree of negligence on the part of the employer. The Trial Court dismissed the complaint because of petitioner's failure to establish these necessary facts.

The *Pinar Del Rio* case, *supra*, has been referred to several times by petitioner and in this brief. That case is also discussed at length in the decision by the New York Court of Appeals in the *Resigno* case, *supra*. On account of the importance of the Pinar Del Rio decision, this Court should not only review its own decision, but also that of the Circuit Court of Appeals, 16 Fed. (2d) 984, wherein the Circuit Court of Appeals for the Second Circuit recognized in no uncertain terms the rule laid down by the Courts of the State of New York as follows:

> "Whether this section applies at all to foreign vessels within our territorial waters has in our judgment been well discussed in *Clark v. Montezuma, etc., Co.*, 217 App. Div. 172, 216 N. Y. S. 295. * * *"

The *Montezuma* case, *supra*, holds that a foreign ship lying in our territorial waters is not subject to regulation and control by Acts of Congress which deal with the rights of seamen.

In this connection, attention of the Court is also di-

rected to the decision of Campbell, D. J., in *The Seirstad,* 27 Fed. (2d) 982. The Court among other things holds:

> "The question here presented has been passed upon in *Clark v. Montezuma Transportation Co., supra, and Resigno v. F. Jarka Co., Inc.*, 248 N. Y. 225, 162 N. E. 13, decided by the Court of Appeals of the State of New York, May 29, 1928, both of which are actions in personam and as *Clark v. Montezuma Transportation Company, supra,* has been cited with approval by our own Circuit Court of Appeals, and its doctrine affirmed by the State Court of Appeals, I feel constrained to hold that, while the Congress undoubtedly had power to give the remedy of the Jones Act to any seaman who is injured within the territory of our waters, irrespective of the nationality of the vessel on which the injury is received, and provisions of Section 33 of the Jones Act are limited to seaman at work upon domestic vessels."

It, therefore, appears that no conflict exists between the recent decisions of the United States District Court of the Eastern District of New York, and the Southern District of New York, on one hand, and the State Courts on the other hand.

The disposition of the *O'Reilly* case in the Southern District and the *Seirstad* case in the Eastern District, indicates that the United States District Judges, in those districts, are now adopting the views laid down by the New York Court of Appeals.

The Supreme Court of the State of Washington was no doubt mislead by the early decisions in the Eastern District of New York, in the *Zarowich* and *Mahoney* cases. If the Supreme Court of the State of Washington should insist upon its present interpretation of the

Jones Act as applied to the common law of that state, and the Court of Appeals of the State of New York should tenaciously abhere to its present construction, as applied to the common law of the State of New York, that situation would not in itself constitute a ground for review by this Court to harmonize those different constructions of the common law in different states. The Supreme Court of Washington has said in the *McGinn* case, *supra,* that it is not bound to recognize the announcements of the United States Supreme Court, relating to laws entirely within that state.

Returning to the primary question, we respectfully submit that an attempt to harmonize the decisions of the Supreme Court of the State of Washington, and the Court of Appeals of the State of New York, will not necessarily change the final result in an action at common law, such as the case at bar, where the Trial Court after hearing the evidence has dismissed the complaint for failure to establish a cause of action.

If the common law of the State of New York is modified by the Jones Act in such cases, the State Trial Courts must still function to determine whether or not a plaintiff has established or has failed to establish a cause of action.

In conclusion, we respectfully submit that the main question presented by the petition has become "moot" so far as future litigation is concerned and as applied to the very few pending cases, the facts and the law should be considered in the regular manner by the Trial Courts and the Courts of review before annoying this Court with such frivolous disputes. The pending cases must be considered in the light of the facts shown upon the trials.

The petition should be denied.

ERNIE ADAMSON,
Counsel for Respondent,
140 Nassau Street,
New York City.